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Decision time on minimum price on alcohol legislation: a victory for the Scottish Government

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Today has seen the Court of Session rule on the legality of the Alcohol (minimum Pricing) (Scotland) Act 2012 (see: <http://www.scotland-judiciary.org.uk/9/1040/Petition-for-Judicial-Review-by-Scotch-Whisky-Association-And-Others>); while the final judgment will be published in a few hours, the Court of Session press release has already been published... and it makes for very pleasing reading for the Scottish Government and in particular for Alex Neil, the Health Secretary (see: <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-22394438>).

Lord Doherty rejected both challenges brought by the SWA against the Bill, i.e. the plea that the Act in question was outwith the competences of the Scottish Parliament under the Scotland Act and the argument that the Act itself represented an unlawful restriction on the freedom of movement of goods under Article 34 TFEU, one which could not have been justified in light of the requirements laid out in Article 36 of the Treaty. Finally, Lord Doherty also refused to entertain any plea that the measure had infringed the limits of the UK competence to regulate the area of trade in wine and other alcoholic or fermented beverages, on the ground that, as the SWA had argued, this area had already been subjected to a degree of harmonisation. Importantly, Lord Doherty refused to make a preliminary reference to the EU Court of Justice-as it is within his powers of doing so under Article 267(3) TFEU.

While the reasoning of the Court of Session was eagerly awaited, many of the conclusions anticipated in the press released could have been expected in light of recent developments in other cases, also concerning challenges to Scottish Parliament legislation under the Act of Union and the Scotland Act. One can, for example, recall the judgment of the UK Supreme Court upholding the validity of Scottish measures outlawing the display of tobacco products and the sale of cigarettes via vending machines in public places. In that case the applicant, Imperial Tobacco, had argued that Holyrood had acted ultra vires in as much as these measures were designed to alter the conditions of "sale or supply of goods" to consumers, an area which was still "reserved" to Westminster. The Supreme Court, however, had thought otherwise; it took the view that the ultimate purpose of the Act was to uphold goals of public health by discouraging the purchase of tobacco products via limiting its "visibility" in shops and its availability to "vulnerable" categories (such as children). Thus, it concluded that since the goal of the measure fell squarely within one of the "key" competence areas of the Scottish Parliament, they had been adopted well within the limits of the Scotland Act (see a previous blog post: <http://www.law.ed.ac.uk/clie/blogentry.aspx?blogentryref=9086>).

It should be reminded that after this decision the SWA had withdrawn part of its arguments concerning the compatibility of the said legislation with the Act of Union. The decision of Lord Doherty confirms the conclusion that just as the "legislative competence" pleas made in the Imperial Tobacco case, the Act of Union's rules governing freedom to trade within the UK did not require that conditions of trade be "identical" across the UK; in particular, he refused to accept that minimum prices could be seen as equivalent to "excise duties", and as such contrary to Article 6 of the Act of Union. He held therefore that the Act remained within the boundaries of the Act of Union in as much as it was of general application and therefore did not discourage traders from other parts of the UK vis-a-vis traders established in Scotland.

It should also be noted that Lord Doherty dealt rather swiftly with the argument that the Scottish minimum

pricing legislation encroached upon the EU competence to act in the field of agricultural policy and in particular to adopt measures designed to harmonise the market for specific products, such as wine and other fermented beverages. He took the view that this area was one of "shared competence" between the Union and the Member States and that, while domestic measures could not be enacted which jeopardised the effet utile of EU action, Member States could intervene to regulate aspects of the area that had not been subject to specific Union measures. On this point, Lord Doherty noted that Regulation 1234/2007, which dealt with the "common organisation" of the wine and spirits market did not cover the issue of price or of protection of health and in general, it was not a "fully harmonising" measure; accordingly, he held that the Scottish Ministers and the Parliament were fully entitled to enact the 2012 Act, subject only to the general limits set out by Articles 34 and 36. Importantly, it was held that none of the rules concerning the harmonisation of the agricultural market prevented Member States from introducing measures governing prices and from pursuing, through them, objectives of public health.

It is however the reasoning on the compatibility of the Act with the EU Treaty rules on free movement of goods that makes for more interesting reading. On this point, one may recall that in June 2012 the Scottish Ministers had notified the draft measures implementing the Act to the Commission, in accordance with the relevant EU measures on technical standards; following that notification, the EU Commission had issued an opinion in September 2012, noting its concern as to the possibility that the proposed minimum pricing rules, whilst being justified in the public interest, could have been "disproportionate". However, Lord Doherty emphasised how the Commission's opinion, just as the views of the other Member States that had chosen to contribute to the notification procedure, were "of interest; but not more than that" and should therefore not bind the Court.

Moving on to the substantive question of the compliance of the minimum pricing legislation with Articles 34 and 36, Lord Doherty refused to entertain the petitioners' argument that similar measures could NEVER be justified: he argued that, unlike in the "tobacco cases" concerning the setting by individual member states of minimum prices for cigarettes (see e.g. case C-221/08, *Commission v Ireland*, [2010] ECR I-1699), the area of alcohol sales had not been subjected to any degree of harmonisation; thus, unlike in those cases, the 2012 Act and the implementing Order had to be assessed exclusively in light of the general provisions of Articles 34 and 36 of the Treaty.

Lord Doherty emphasised that domestic authorities had been allowed a margin of appreciation in enacting measures affecting rights and freedoms granted by EU law; thus, the domestic court should scrutinise these measures just as the Court of Justice would do, by asking whether an "objective justification" existed for them. In this context, Lord Doherty held that under Article 36 TFEU this assessment should encompass the question of whether the measure in issue was "appropriate for securing the attainment of the objective pursued" and did not "go beyond what is necessary in order to attain it". This notion should instead be interpreted as requiring that the proposed measure be both "appropriate", in the sense of "genuinely reflecting a concern to attain an objective in a consistent and systematic manner", and "necessary"; the latter criterion should be read as meaning that the measure be "proportionate", i.e. that no other alternative exists to it that is less restrictive of interstate trade. Thus, it was held that the Treaty could not be read as obliging the domestic authorities "to prove, positively, that no other conceivable measure could enable that objective to be attained under the same conditions".

On that basis, Lord Doherty reviewed the minimum price legislation: in respect to the question of which "public interest goal" the legislation pursued, he observed that the Act was aimed not at "eradicating alcohol consumption" in full, but only at "striking at alcohol misuse and overconsumption", by targeting sales of "cheap alcohol" to mainly "hazardous drinkers". Thus, in his view this goal represented a "legitimate aim" within the meaning of Article 36, and was being pursued by measures adopted in "good faith and with the best of intentions" in order to stamp out alcohol-related harm caused by dangerous drinking patterns. The imposition of minimum prices was regarded as "appropriate" to achieve these aims, on the ground that it would result in the diminution of consumption of "cheaper" beverages across the most vulnerable groups who tended to spend more of their income

in alcohol purchases and were, consequently, more sensitive to price changes. Seen in this light, and considering the level of health harm suffered by those in lower income groups, the measures in question were regarded as being "suitable" to the attainment of their public interest goal. Finally Lord Doherty approached the central question, i.e. the issue of whether the imposition of minimum prices was "proportionate", i.e. whether an alternative measure existed that was "just as effective as minimum pricing" in securing these public health gains. He first compared minimum pricing with the most "obvious alternative", namely the increase of excise duties on alcoholic beverages: after observing that unlike minimum pricing, an increase in excise was less "easy to understand, measure and enforce" and encouraged traders to absorb it in their sales structure (e.g. by cross-subsidising it against the revenues from the sale of more expensive alcohol). Perhaps most importantly, it was emphasised that increasing the percentage of excise would not be "sensitive" to the different alcohol content of each beverage and consequently would be both "disproportionate" vis-a-vis the demands of preventing alcohol related harm resulting from lesser strength products and less suitable to achieve the public health objectives being pursued; on this specific point, Lord Doherty accepted that, unlike with minimum pricing, the excise structure could not be adjusted to target "hazardous drinkers" only or mainly, by increasing the price of cheaper alcohol and therefore could not be used to "displace" demand from the most vulnerable consumers by depriving them in essence of the option of "trading down".

Thus, Lord Doherty concluded that the measures introduced by the 2012 Act were "objectively justified" within the meaning of Article 36 TFEU: in his view, the Scottish Government and the Parliament had, in choosing to enact minimum pricing measures, struck a balance between the level of public health that they considered to be a desirable goal and the interests of those affected by the measure. He observed that in doing so it was legitimate to take into account such factors as the socio economic considerations arising from the impact of the Act on "mild" drinkers: however, since the target of the Act was to diminish consumption among "hazardous drinkers", who were likely to trade down on "cheaper" alcohol, as opposed to "stamping out" alcohol consumption altogether, minimum pricing, in view of its "differentiated impact" on sale prices, was the least "restrictive" of the options available to attain the "desired degree of protection of health and life" in light of all circumstances.

The ruling in the case of *Scotch Whisky Association v Scottish Ministers* represents a true landmark case for a number of reasons: leaving aside the political sensitivities of this case, both for the Scottish Government (whose leading party had been strongly pursuing this agenda since its first foray in power) and for the UK Government—which had tried a consultation on similar measures, albeit on the basis of public order concerns—the judgment represents a clear and cogent analysis of the compatibility of measures restraining the freedom to set prices (which is perhaps the most important manifestation of a "free" and competitive market) for the purpose of serving "higher goals" and the good of society. It also reflects the complex, multi-layered and nuanced relationship between the EU and its Treaties and the Member States' policy agendas, interests and choices since it relies on the concept of "necessity" and of "proportionality" in order to identify which measures, among a set of alternatives that can all in principle fulfil the same public interest, are the "least restrictive" for the internal market and, it could be argued, also for free competition. More generally, it could be argued that the choice of Lord Doherty to engage actively with the relevant case law in order to deal with these complex questions speaks of the willingness of the Court of Session to act as a "true European Union court" (see <http://www.law.ed.ac.uk/clie/blogentry.aspx?blogentryref=9169>). At this stage, it is difficult to predict what the next steps of this fascinating story will be: it may be wondered, for instance, whether the SWA will appeal the judgment and whether, in that case, the UK Supreme Court will make a reference to Luxembourg. What is clear however is that the Court of Session seems to have embraced the central role played by the public health and human welfare (or, in the words of the Treaty, "health and the life of humans") within the framework of Article 36 TFEU. More generally, the ruling suggests that, within the general framework of the EU treaties, "the needs of the single market" may have to give way in favour of these objectives, subject to the assessment made by those authorities that are "closer" to the demands of a specific society in a given moment of time: however, it is equally clear that the "outer boundaries" of this margin of discretion are once again those principles of "necessity" and of

"proportionality" that the EU Court of Justice has painstakingly built over the years and to which the Court of Session has showed a strong commitment.

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